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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-508

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN, ET AL.

ON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LOUIS DUGAS, JR.
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Respondant

QUESTION PRESENTED

WHETHER THE REPEATED TRESPASS ONTO RESPONDENT'S RANCH BY LAW ENFORCEMENT OFFICERS AND THEIR ENSUING WARRANTLESS SEARCHES OF RESPONDENT'S RANCH BUILDINGS VIOLATE THE FOURTH AMENDMENT.

PARTIES TO THE PROCEEDING

ROBERT LYLE CARPENTER WAS A DEFENDANT BELOW AND IS THEREFORE A RESPONDENT IN THIS COURT.

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OPINION BELOW

THE OPINION OF THE COURT OF APPEALS IS REPORTED AT 674 F.2D 1093.

JURISDICTION

THE JURISDICTIONAL REQUISITES ARE ADEQUATELY SET FORTH IN THE PETITION.

STATEMENT OF THE CASE

Respondent is in agreement with much of petitioner's statement of the case. The following constitute the respondent's statement of the area with which he disagrees with petitioner.

After trespassing upon the ranch owned by Ronald Dale Dunn and conducting a visual and systematic search of the barns, garage, house and carport areas of the ranch, officers came to the barn where they smelled an odor which was not contraband. They tried a door to the barn and found it locked. They crossed another fence and at that point they were right underneath the overhang of the barn where a gate led further into the barn. They tried this gate and found it locked and shut. Above this gate was a netting which hung from the ceiling to the gate. They stood right at the gate and began their search with the aid of flashlights. R-4-80.

The officers looked into the carport and then tried to enter the garage by trying the windows and the doors and everything was locked up. These trespassing officers searched only buildings on the property. R-4-83.

ARGUMENT

I. THE DECISION BELOW IS CLEARLY CORRECT.

After a searching examination of the entire record in this case, the Court of Appeals concluded that the barn in question was within the curtilage of the residence and was within the protective ambit of the fourth amendment. The court of appeals concluded that the curtilage extended to the barn on the Dunn Ranch; that the officers had no probably cause to search and that the repeated trespass by the officers negated any claim of exigent circumstances and that the Government had not met its burden of justifying a warrantless search.

The decision by the Court of Appeals turns upon its own facts and it will affect few others.

II. RONALD DALE DUNN HELD A REASONABLE EXPECTATION OF PRIVACY OVER HIS RANCH AND THE BUILDINGS THEREON, INCLUDING THE BARN AND ITS CONTENTS.

As the Court of Appeals stated, the ranch, modest in size for that area of Texas, is approximately 198 acres, and is encircled by a perimeter fence. The residence and the other buildings are in a small clearing almost entirely surrounded by trees. The house and the barns are neither visible from the farm to Market road, nor are they visible from the perimeter fence. There are interior fences,

including one around the residence and one around the subject barn. See App. A 8a, 9a.

At the intersection of the private road leading to the Dunn residence and the farm to Market road there is a gate which is locked. The residence is set back one-half mile from the farm to market road. The house was locked. The barn had a door which was locked. The fence surrounding the barn was made of wood. The gate leading further into the barn was locked. The garage had doors and windows within the residence fence. These were locked. R-4-83.

As the Government argued in it's petition Florida vs. Brady " a landowner may however take substantial measures to exclude outsiders from his field such as erecting a barrier designed to prevent entry by other persons". Page 5.

Further, open field is subject to aerial observation. A building such as a barn in question would not be subject to such observation. The fence surrounding the premises of respondent's ranch were designed to exclude trespassers.

A barn is more likely to be the repository of personal effects than an automobile, open field, or a phone booth.

In addition, the officers violated a penal statute of Texas by trespassing on the Dunn Ranch. The statute in question is Art. 30.05, Penal Code of Texas. It reads:

a. A person commits an offense if

> he enters or remains on property or in a building of another without effective consent and he: ...
>
> 1. had notice that the entry was forbidden; or
>
> 2. "notice" means: ...
>
> b. fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or

The officers, being stationed in Texas and working with Texas officers in making the warrantless search, certainly should have been aware of this statute. For this statute guarantees a reasonable expectation of privacy if its requirements are not met as they were in this case.

III. THE COURT OF APPEALS FOUND THAT THE WARRANTLESS SEARCHES HAD INTRUDED UPON THE CURTILAGE.

In 25 C.J.S. p. 82 "curtilage" is defined as:

> **"In its most comprehensive and proper legal signification it included all that space of ground and buildings thereon which is usually inclosed within the general fence, immediately surrounding a principal message, out-buildings, and yard, closely adjoing to a dwelling house . . ."**

The definition by the Court of Appeals

is in conformity with C.J.S., App. A-10a.

In this case, there was a strong perimeter fence; there was a clearing surrounded by trees where the residence and the barns were located. There were additional fences.' The barn was fifty yards from the residence, and therefore, the barn searched without a warrant was well within the curtilage.

Whatever Hester stands for, it certainly does not extend to a warrantless search of buildings surrounded by fences. The search by the agents involved only buildings. There were no fields searched, therefore, there is no cause to apply Hester.

CONCLUSION

For the above reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

LOUIS DUGAS, JR., hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for RONALD DALE DUNN, Respondent in the above matter; and that a true and correct copy of the above and foregoing Brief in Opposition has been mailed to the attorneys for the Petitioner, the Honorable Rex E. Lee, Solicitor General of the U. S. by mail, postage prepaid, on this 17th day of December, 1982.

LOUIS DUGAS, JR.